

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
CORE COMMUNICATIONS, INC.)	WC Docket No. 03-171
)	
Petition for Forbearance under 47 U.S.C. §)	
160(c) from Application of the <i>ISP Remand</i>)	
<i>Order</i>)	
To: The Commission		

CONDITIONAL PETITION FOR RECONSIDERATION

Qwest Corporation (“Qwest”) seeks reconsideration of the action of the Federal Communications Commission (“Commission” or “FCC”) in *Core Communications, Inc.*, WC Docket No. 03-171, FCC 04-241 (adopted Oct. 8, 2004, released Oct. 18, 2004) (“*Core Order*”), to the extent the Commission may have permitted the Petition for Forbearance (“Petition”) filed by Core Communications, Inc. (“Core”) to be “deemed granted” under the provisions of Section 10(c) of the Communications Act (47 U.S.C. Section 160(c)) on October 12, 2004. While the Commission took the position that it was denying the petition, and Qwest agrees that the Core Petition was lawfully denied, there remains the outside possibility that a reviewing court could find that the Petition was “deemed granted.” Qwest, therefore, requests that the Commission provide an alternate disposition of the Petition to the extent a court should so hold. This can be accomplished easily by the simple device of issuing a lawful decision finding that, to the extent

that the Core Petition was “deemed granted” through the passage of time, that decision is reversed on reconsideration for the reasons stated in the *Core Order*.¹

I. BACKGROUND

On July 14, 2003, Core filed a forbearance petition requesting that the Commission “forbear” from enforcing certain rules governing the exchange of ISP-bound traffic between telecommunications carriers. Specifically, Core requested that the Commission forbear from applying the rate caps, growth caps, new markets rule and mirroring rule promulgated in the *ISP Remand Order*,² and to simply reinstate ISP reciprocal compensation as it had been developed prior to that decision. This petition was scheduled to be either acted on or “deemed granted” by the FCC within one year of filing, or by July 13, 2004.

On June 22, 2004, the Senior Deputy Chief of the Wireline Competition Bureau, acting pursuant to delegated authority, exercised the statutory authority of Section 10(c) of the Act and extended the deadline for ruling on the Petition by an additional 90 days—until October 11, 2004.³ Because October 11, 2004 was a federal holiday, the actual date for operation of the “deemed granted” provisions of the Act was October 12, 2004.

On October 8, 2004, the Commission adopted the *Core Order*, generally denying the Petition in a number of material respects because Core had not met the statutory standard for

¹ By this filing, Qwest is not expressing agreement with the entire *Core Order*. Those parts of the *Core Order* that revised the FCC’s interim ISP reciprocal compensation rules are not lawful, and Qwest reserves the right to appeal the *Core Order* with respect to such portions of the decision. This Petition is directed only towards the potential legal consequences of the failure of the FCC to release an order denying the Core Petition within the statutory deadline, to the extent that deadline affects the validity of a decision adopted before, but released after, the deadline.

² See *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001).

³ *Core Communications, Inc.*, 19 FCC Rcd 11075 (WCB July 23, 2004).

forbearance. On the same day the Commission issued a press release stating that the Commission had voted to deny in part and grant in part Core's forbearance petition. The notice stated that the Commission had found that Core had "not met the statutory criteria for forbearance under section 10 with respect to rate caps and the mirroring rule." However, the notice also stated that the Commission had voted to grant forbearance from the growth caps and new markets rules, based on its finding that these rules were no longer in the public interest.⁴

On October 18, 2004, the Commission released the order it had adopted on October 8. In it, the Commission denied the Core Petition but granted, on its own motion, forbearance from the growth cap and new market rules on an industry-wide basis. The Commission left in place the cap on price for ISP reciprocal compensation (\$0.0007 per minute of use), the presumption that traffic in excess of a 3-1 ratio was ISP traffic, and the rule requiring that incumbent local exchange carriers ("ILECs") "mirror" the capped ISP reciprocal compensation rates in order to be eligible to pay the ISP reciprocal compensation rate to competitive local exchange carriers ("CLECs"). The *Core Order* specifically stated that it "shall be effective on Friday, October 8, 2004[,] the date of its adoption."⁵

On October 27, 2004, Core filed a "complaint for declaratory relief" with the United States Court of Appeals for the District of Columbia Circuit.⁶ Core's complaint claims that the press release the Commission issued on October 8 regarding its vote on Core's forbearance petition was insufficient, and that the petition was "deemed granted by operation of law" on

⁴ The news release announcing the decision, which was issued late on October 8, contained the customary disclaimer: "This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See *MCI v. FCC*, 515 F.2d 385 (D.C. Cir. 1974)." News Release, *FCC Grants Partial Forbearance from ISP Remand Order* (Oct. 8, 2004).

⁵ Core Order, ¶¶ 28 (footnote omitted) and 29.

⁶ Core's filing was made under the declaratory judgment provisions of 28 U.S.C. § 2201.

October 11, 2004. This “complaint” asserted that passage of the October 11 (actually October 12, due to the federal Columbus Day holiday) deadline without formal release of an FCC order denying its petition for forbearance “divested [the Commission] of jurisdiction over [the] Core . . . Petition” and that it was entitled to a “declaratory” order to the effect that the October 18, 2004 Core Order was “void for lack of jurisdiction and has no legal effect.”⁷

II. RECONSIDERATION

Qwest submits that it is clear that the time limits set forth in Section 10(c) of the Act are meant to have teeth, and that the “deemed granted” language of that section means what it says. If the FCC has not acted on the petition, it is *deemed* (*i.e.*, treated as though) granted upon the expiration of the deadline, but if the FCC has acted on the petition prior to the deadline, it is not deemed to have been granted. However, it is also clear that, contrary to the premise of the Core Complaint to the D.C. Circuit, the passage of time without action by the FCC on a forbearance petition does not “divest” the Commission of jurisdiction, it merely operates to effectuate a grant of the petition subject to the normal rules regarding reconsideration and judicial review. The passage of time without action by the Commission on such a petition most assuredly does not relieve the Commission of its obligation to engage in reasoned decision-making when adopting rules that affect other parties to a forbearance petition, or that may be affected by Commission action or inaction on a forbearance petition. Nor does such passage of time take such a grant by operation of law out of the realm of the scope of the FCC’s reconsideration powers under Section 405(a) of the Act.⁸

⁷ *Core Communications, Inc. v. FCC*, No. 04-1368, Complaint for Declaratory Relief, at 9-10 (D.C. Cir. Oct. 27, 2004) (“Core Complaint”).

⁸ See 47 U.S.C. § 405; *Amendment of Parts 1 and 90 of the Commission’s Rules Concerning the Construction, Licensing, and Operation of the Private Land Mobile Radio Stations*, 6 FCC Rcd

In this case there are two possible legal positions. First, it can be argued that the Commission's adoption of an order denying the Core Petition on October 8 operated to fulfill the requirements of Section 10(c) of the Act and avoid operation of the "deemed granted" language of the Act. If this is the case, there is no need for further action by the Commission, and the parties can litigate the lawfulness of the *Core Order* on its merits. The difficulty with this position is that it seems on its face to run afoul of the longstanding rule that an FCC order is deemed effective upon release, not upon adoption, a point that Core relies upon heavily in its "complaint" in the D.C. Circuit.⁹

On the other hand, the D.C. Circuit itself has cautioned that the forbearance provisions of Section 10 of the Act are not meant as a device to elevate form over substance, which clearly is what Core is trying to accomplish before the Court.¹⁰ The language of the statute is plain and unambiguous, and it is satisfied by the fact that the FCC voted to adopt an order denying the Core Petition on October 8, 2004. Accordingly, under *Chevron v. NRDC*, the petition would not be deemed granted.¹¹ Moreover, even if the statutory language were considered ambiguous, the Commission's implicit interpretation of it was reasonable under *Chevron v. NRDC*¹² — namely, that its vote to adopt the order and to make the order effective upon adoption sufficed to prevent the petition from being "deemed granted," even though the formal release of the Order did not occur until October 18.

7297, 7300, n.40 (1991) (30-day reconsideration period in 47 U.S.C. § 405 applies to actions occurring by operation of law).

⁹ See Core Motion for Summary Judgment before the D.C. Circuit, No. 04-1368, at 13-16 (D.C. Cir. Oct. 27, 2004).

¹⁰ See generally *Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004).

¹¹ *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984); see also *USTA v. FBI*, 276 F.3d 620, 624 (D.C. Cir. 2002).

¹² *Chevron v. NRDC*, 467 U.S. at 843.

Fortunately, the Commission need not speculate on how this particular legal issue might turn out if actually litigated. Instead, the Commission clearly still has jurisdiction to review the legal consequences of the release of the Core Order on October 18, 2004, rather than on or prior to October 12, pursuant to the reconsideration provisions of Section 405(a) of the Act. To the extent the “grant” of the Petition could arguably have occurred on October 12, despite the prior adoption (and subsequent release) of an order denying it in part, the instant petition for reconsideration is being filed within 30 days of that date, giving the Commission unquestionably the jurisdiction to reconsider any unintended grant that may have occurred as a matter of law.

In fact, given the extraordinary prejudice that Qwest would suffer if the Core Petition were allowed to take effect without any analysis at all, the Commission has a legal duty to act to ensure that its action — both for and against Qwest — comport with the requirements of the Administrative Procedure Act.¹³ As Core is claiming that it has a statutory right to elimination of all of the FCC’s interim ISP reciprocal compensation rules without any analysis at all, the Commission now has a duty to supply that analysis on reconsideration.

The reconsideration order that we seek is not complicated. It would simply state that the Core Petition is denied on the bases elucidated in the Core Order, and nothing more. But it is clearly imperative that Qwest and other affected carriers who opposed the Core Petition have their own right to reasoned decision-making at the FCC (and their appellate rights) protected by the Commission. The Commission cannot permit the uncertainty caused by the timing of the Core Order to remain. A simple reconsideration order can dispose of the problems identified in the Core Complaint.

¹³ See, e.g., 5 U.S.C. § 555(e).

WHEREFORE, Qwest respectfully requests that the Commission issue an appropriate order finding that, to the extent necessary to preserve its denial of the Core Petition, Qwest's reconsideration petition is granted and the Core Petition is denied.

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November 10, 2004

CERTIFICATE OF SERVICE

I, Ross Dino, do hereby certify that I have caused the foregoing **CONDITIONAL PETITION FOR RECONSIDERATION** to be 1) filed with the FCC, via its Electronic Comment Filing System in WC Docket No. 03-171, 2) served, via email on the FCC's duplicating contractor, Best Copy and Printing, Inc. at fcc@bcpiweb.com and 3) served via First Class United States Mail, postage prepaid, on the parties listed on the attached service list.

/s/ Ross Dino

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November 10, 2004

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